

No. 15618

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**United States  
Court of Appeals**  
for the Ninth Circuit

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**RICHARD D. LEUSCHNER,**

Appellant,

vs.

**FIRST WESTERN BANK AND TRUST CO., a  
Corporation,**

Appellee.

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**Supplemental  
Transcript of Record**

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**FILED**

**DEC - 9 1957**

**PAUL P. BISHOP, CLERK**

**Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Superior Court of the State of California,  
in and for the City and County of San Francisco

No. 456519

RICHARD D. LEUSCHNER,

Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COMPANY, a California Banking Corporation, and  
ERIDA LEUSCHNER REICHERT,

Defendants.

### COMPLAINT FOR MONEY

Plaintiff complains of defendants and for cause of action alleges:

#### I.

That on or about the 16th day of April, 1941, Ida Denicke Leuschner, as donor, and The San Francisco Bank, a California banking corporation, Armin O. Leuschner, Erida Leuschner Reichert and Richard D. Leuschner, as trustees, made, executed and delivered a certain trust agreement, a copy of which is attached hereto, marked "Exhibit A," and made a part thereof.

#### II.

That as a part of said transaction Ida Denicke Leuschner transferred and delivered to said trustees all of the property therein agreed to be transferred and delivered, and said trustees accepted said property and said trust, and entered upon the discharge

of their duties. That thereafter, and on or about April 15, 1943, the said Armin O. Leuschner, one of the trustees aforesaid, died. That thereafter, and prior to the filing of this complaint, The San Francisco Bank, a California corporation, duly and regularly changed its name to First Western Bank and Trust Company. That said First Western Bank and Trust Company, a California corporation, Erida Leuschner Reichert, and plaintiff are now and ever since the 1st day of July, 1955, have been the duly appointed and acting trustees of said trust created by Ida Denicke, Leuschner.

### III.

That, among other things, said trust agreement provides for the payment to the beneficiaries therein named of certain sums during each month of the existence of said trust. That said monthly sums are computed on the basis therein set forth, namely,  $\frac{1}{2}$  of 1% of the principal sum of said trust, together with all of the income of said trust.

### IV.

That plaintiff herein is also one of the beneficiaries of said trust and is entitled to monthly distributions as in said trust provided.

### V.

That notwithstanding the provisions of said trust, the trustees thereof, other than plaintiff as trustee, have, ever since the 1st day of July, 1955, failed, neglected and refused to pay to plaintiff any of the



sums provided in said trust to be paid for each and every month of its existence.

## VI.

That, as of the date hereof, said trustees have accumulated in said trust sums in excess of \$6,994 rightfully belonging to plaintiff herein, all of which sums ought to be paid to plaintiff, and that although plaintiff has demanded said sums, defendants, as trustees, have failed and refused, and still refuse, to pay said sums to plaintiff.

## VII.

That plaintiff is one of the persons for whom said trust was created, and that all of said distributions are necessary for his support.

For a Second, Separate and Distinct Cause of Action  
Against Defendants, Plaintiff Complains and  
Alleges:

### I.

That within two years last past defendants became indebted to plaintiff in the sum of \$6,994 for money had and received by defendants for the use and benefit of plaintiff.

### II.

That the defendants, though requested, have not paid the same, nor any part thereof, to the plaintiff, but refuse to do so.

Wherefore, plaintiff prays judgment against defendants, and each of them, for the sum of \$6,994, with interest thereon until paid, together with his

costs of suit incurred herein and such other and further relief as to the Court may seem meet.

.....

.....

Attorneys for Plaintiff.

Duly verified.

## EXHIBIT A

### Agreement of Trust

This Agreement, made this 16th day of April, 1941, by and between Ida Denicke Leuschner (hereinafter called the "Trustor"), the party of the first part, and The San Francisco Bank, a California banking corporation, having its principal place of business in the City and County of San Francisco, State of California, Armin O. Leuschner, Erida Leuschner Reichert, and Richard D. Leuschner (hereinafter called the "Trustees"), the parties of the second part,

Witnesseth:

That the Trustor, Ida Denicke Leuschner, hereby represents to the Trustees that she is the unqualified owner of all the real and personal property described in the schedule annexed hereto, made a part hereof and marked Exhibit A, and hereby grants, conveys, assigns, transfers and delivers all such property to the Trustees, in trust, however, for the uses and purposes and upon the terms and conditions set forth in this agreement.

## I.

The Trustor agrees, upon demand of the Trustees, to execute and deliver to the Trustees such instruments of conveyance, transfer and further assurance and do such further and other acts as may be necessary or requested by the Trustees for more fully vesting and confirming in the Trustees, as such, the complete title to said property listed and described in said Exhibit A. With the written consent of the Trustees, any other property acceptable to the Trustees may at any time and from time to time be added to and become a part of the property forming the trust estate, and in such event the Trustees' rights and obligations with respect to such other property, when the same is properly conveyed, assigned, transferred and delivered to them as such Trustees, shall be the same as their rights and obligations with respect to the property described in said Exhibit A. In order to facilitate transfers of title pursuant to the terms of this agreement, all real property, shares of corporate stock and registered bonds which shall at any time be a part of the trust estate shall be held of record in the name of The San Francisco Bank, as Trustee, or its nominee or nominees, and title to such property may be transferred of record by said The San Francisco Bank as such Trustee.

## II.

The Trustees shall collect and receive the income from the property at any time forming the trust estate of the trust created by this agreement and shall pay the entire net income from the trust estate

in monthly payments to Ida Denicke Leuschner, the Trustor, during her lifetime. After the death of the Trustor, the Trustees shall pay one-half of the entire net income of the trust estate in monthly payments to Armin O. Leuschner while he is living during the trust term; and shall pay the balance of such net income, or, while said Armin O. Leuschner is deceased during the trust term, all of such net income, plus one-half of one per cent per month of the principal of the trust estate, determined in the manner hereinafter set forth, in monthly payments as follows (the aggregate of each monthly payment made to persons other than the Trustor or Armin O. Leuschner, including both net income and principal, is hereafter referred to as the "monthly payment" and such payments are collectively referred to as "monthly payments"):

(a) If and while Frederick D. Leuschner is living during the trust term, each monthly payment shall be divided into three equal parts and one of such parts shall be paid to Frederick D. Leuschner and one of such parts shall be paid to each of Erida Leuschner Reichert and Richard D. Leuschner while they are living, and, if Erida Leuschner Reichert shall be deceased at the time any monthly payment becomes payable, the part of such monthly payment which she would have received if living shall be paid to her two daughters, Erida Leuschner Reichert, Jr., and Susan Leet Reichert, in equal shares, and, if Richard D. Leuschner shall be deceased at the time any monthly payment becomes payable, the part

of such monthly payment which he would have received if living shall be paid to his two children, Richard D. Leuschner, Jr., and Elizabeth E. Leuschner, in equal shares.

(b) If and while Frederick D. Leuschner is deceased during the trust term, each monthly payment shall be divided into five equal parts, and such parts shall be paid by the Trustees as follows: One of such parts shall be paid to Lynn Leuschner, the daughter of Frederick D. Leuschner; two of each parts shall be paid to Erida Leuschner Reichert or, if she is not living at the time such monthly payment becomes payable, one of such parts shall be paid to each of her two daughters, Erida Leuschner Reichert, Jr., and Susan Leet Reichert; and two of such parts shall be paid to Richard D. Leuschner or, if he is not living at the time such monthly payment becomes payable, one of such parts shall be paid to each of his two children, Richard D. Leuschner, Jr., and Elizabeth E. Leuschner.

(c) In the event that any of the said Richard D. Leuschner, Jr., Elizabeth E. Leuschner, Erida Leuschner Reichert, Jr., Susan Leet Reichert, and Lynn Leuschner shall be deceased during the trust term leaving issue him or her surviving who shall be living at the time a monthly payment becomes due, a part or share of which would have been paid to the decedent if living, such part or share shall be paid to such living issue in equal shares per capita, but, if no issue of such decedent be then living, the part or share of such monthly payment which the decedent would have received if living shall be paid



to the persons who are then living and entitled to receive parts or shares of such monthly payment, in respective shares of the same relative proportions as the parts or shares of said monthly payment such persons are otherwise entitled to receive bear to one another.

(d) During the minority of any person to whom any payments are required to be made hereunder, the Trustees may make such payments to the guardian of the person of such minor, or to the parent of such minor, or to the person with whom such minor resides, or directly to such minor, or otherwise as to the Trustees shall be deemed to be to the best interests of such minor, and the Trustees shall not be required to see to the application of any payment so made.

(c) In the event there shall be included in the property at any time forming the trust estate the promissory note or other obligation of any beneficiary of this trust, the Trustees shall withhold from such beneficiary all sums payable to him or her under this agreement and shall apply such sums so withheld to the payment of the principal and interest, as the same become due, upon said promissory note or other obligation until payment thereof in full. Nothing herein contained, however, shall be construed as modifying the liabilities of any such beneficiary or any other person upon any such promissory note or other obligation, or the rights and powers of the Trustees to enforce such liabilities in accordance with the terms of such promissory note or other obligation.

(f) In the event that the Trustees shall at any time during the term of this trust determine that any of said Ida Denicke Leuschner, Armin O. Leuschner, Erida Leuschner Reichert, Frederick D. Leuschner, Richard D. Leuschner, Richard D. Leuschner, Jr., Elizabeth E. Leuschner, Erida Leuschner Reichert, Jr., Susan Lee Reichert, and Lynn Leuschner are in need of funds, on account of any illness, injury or other emergency, to provide medical, hospital, nursing and kindred services or otherwise to care for them, or any of them, and, if the Trustees shall determine that the payments, if any, made to any such person under this agreement, together with his or her income, if any, from other sources, are insufficient for such purposes, then the Trustees may at any time apply such reasonable portion of the income and/or principal of the trust estate to provide such adequate medical, hospital, nursing and kindred services and to care for such person on account of any such emergency. The Trustees in their sole discretion shall determine whether any payments shall be made under this paragraph and what sums or things are necessary or proper to accomplish the said purposes; they shall not be required to see to the application of any such payment made by them; and they shall not be responsible for any errors in judgment in determining the propriety or the amount of any such payment.

As soon as reasonably practicable after the death of the Trustor, the Trustees shall estimate the aggre-

gate value, as of the date of the death of the Trustor, of the principal of the trust estate then in the hands of the Trustees, for the purpose of determining the amount of such principal to be included in each monthly payment to be made during the balance of the year in which the death of the Trustor occurs. The amount of principal of the trust estate to be included in each monthly payment shall be one-half of one per cent of the aggregate value so estimated by the Trustees. During the month of January next succeeding the first such estimate of value made by the Trustees, and during January of each of the following nine years during the term of this trust, the Trustees shall estimate the aggregate value, as of January 1st, of the principal of the trust estate then in the hands of the Trustees, for the purpose of determining the amount of such principal to be included in each monthly payment to be made during the ensuing year, and the value estimated during the tenth January shall determine the amount of such principal to be included in monthly payments during the balance of the trust term. The amount of principal of the trust estate to be included in each monthly payment during such ensuing year (and during the balance of the trust term in the case of the value estimated during said tenth January) shall be one-half of one per cent of the aggregate value so estimated by the Trustees during the month of January of such year. Every determination of value made by the Trustees as set forth above shall be final and conclusive and binding upon all persons having any interest in this trust or the trust estate.



In the event that Armin O. Leuschner shall survive the Trustor and Erida Leuschner Reichert, Frederick D. Leuschner, Richard D. Leuschner, Richard D. Leuschner, Jr., Elizabeth E. Leuschner, Erida Leuschner Reichert, Jr., Susan Leet Reichert, and Lynn Leuschner, and the issue, if any, of the five persons last named, no further monthly payments (as the term "monthly payments" is defined above) shall be made during the balance of the trust term, and the one-half of the net income of the trust estate not disposed of by the foregoing provisions of this section II shall be accumulated by the Trustees and shall be added to and become a part of the principal of the trust estate.

### III.

This trust shall terminate upon the happening of the one of the following events which is first to occur, viz.:

(a) Upon the death of the last survivor of Ida Denicke Leuschner, Armin O. Leuschner, Erida Leuschner Reichert, Frederick D. Leuschner, Richard D. Leuschner, Richard D. Leuschner, Jr., Elizabeth E. Leuschner, Erida Leuschner Reichert, Jr., Susan Leet Reichert, and Lynn Leuschner;

(b) Upon the complete exhaustion of the principal and income of the trust estate by the making of the monthly payment and all other payments authorized to be made by the Trustees under this agreement.

If this trust shall terminate prior to the exhaustion of the principal and income of the trust estate,

then the entire principle of the trust estate and all accrued income therefrom, if any, then in the hands of the Trustees shall be paid to the persons who are then living and who, by the terms of this agreement, are then entitled to receive parts or shares of the next monthly payment in respective shares of the same relative proportions as the parts or shares of the next monthly payment which such persons are then entitled to receive bear to one another. If, upon such termination, there is no person then living who is then entitled, under the terms of this agreement, to receive any part or share of the next monthly payment, the entire principal of the trust estate and all accrued income therefrom, if any, then in the hands of the Trustees shall be paid in equal shares to such of the husbands and wives of said Erida Leuschner Reichert, Frederick D. Leuschner, Richard D. Leuschner, Richard D. Leuschner, Jr., Elizabeth E. Leuschner, Erida Leuschner Reichert, Jr., Susan Leet Reichert and Lynn Leuschner, and of the issue, if any, of the five persons last named as are then living and who were married to and residing with their respective spouses at the times of the deaths of such spouses. For the purposes of this paragraph, the "next monthly payment" shall be deemed to be payable at the time of the termination of this trust.

#### IV.

The following provisions shall govern the administration of the trust hereby created, viz.:

(a) The Trustor shall pay any and all taxes and assessments of every kind and nature, including gift

taxes and documentary stamp taxes, which may be levied or imposed upon or assessed against the Trustor as the transferor of the property forming the trust estate of the trust created by this agreement and transferred by the Trustor to the Trustees, and, in case the Trustor shall fail to pay any such taxes or assessments, the Trustees may pay the same, or any portion thereof, out of the income of the trust estate, or, if said income be insufficient, then the balance thereof out of principal. The Trustees shall pay out of the income of the trust estate, or if said income be insufficient then the balance thereof out of principal, all taxes, assessments, costs, fees and expenses of every kind and nature incurred or expended in the collection, care, administration, protection or distribution of the trust estate, for the payment of which the trust estate and/or the Trustees may become chargeable, including reasonable compensation for the services of The San Francisco Bank or any bank or trust company successor thereto, as Trustee hereunder, and for the services of attorneys employed by the Trustees in connection with the trust, excepting, however, such of said items which under the provisions hereof are, or as hereinafter provided may be determined by the Trustees to be, chargeable against principal, which said last-mentioned items shall be paid by the Trustees out of principal.

(b) In the event that any inheritance or other death taxes, however designated, shall be imposed upon the property of this trust or the interest of any

beneficiary therein, the Trustees shall pay the same when due; provided, however, that if any such tax shall be imposed partly in respect to the property of this trust and partly in respect to other property, the Trustees shall pay a proportion of the total tax equivalent to the proportion which the property subject to this trust on which such tax is imposed bears to the total property on which such tax is imposed, giving such weight to exemptions, deductions and other factors and paying, also, such part of any interest or penalty due on such tax as shall appear, in their judgment, to be reasonable and just, or as they shall, in their discretion, agree upon with the other parties interested. Any such payment of said tax shall be made by the Trustees out of and be charged to the principal of the trust estate.

(c) Whenever the principal of the trust property, or any part thereof, shall be invested in bonds, notes or other securities bought or received at a premium or discount, the persons entitled to receive the income shall be entitled to receive the full income thereof and no deduction therefrom or addition thereto shall be made for the purpose of authorizing such premium or discount, and no part of the amount received upon the maturity or redemption of any securities shall be construed as income, no matter at what price the said securities may have been purchased. All cash dividends, except liquidating dividends, shall be treated as income and all liquidating dividends shall be treated as principal. Any net profit or net loss from any sale of any prop-



erty at any time forming a part of the trust estate shall be credited or charged to principal. The Trustees shall pay for ordinary repairs to real property and tangible personal property out of income, but no reserves need be created out of income for any depreciation or destruction of trust property. The Trustees shall, except as is otherwise herein provided, reasonably determine what shall be charged or credited to income and what to principal, and shall not be liable to any person for any error of judgment made in good faith in such determination.

(d) To carry out the express purposes of this trust and in aid of its execution and the proper administration and management of the trust estate, the Trustees are vested during the continuance of the trust term with the following additional powers and discretions: At their option and as long as they may deem advisable, to retain as part of the trust estate any securities or property which may be transferred to them under this trust, whether the same are approved investments for trust funds or not, and the Trustees shall incur no liability by reason of any depreciation in the value of any such securities or property; to manage the trust estate and to have full power and authority to do any and all acts which they may deem necessary in connection therewith, including power, upon such terms and conditions as the Trustees deem advisable, (i) to sell any property at any time forming a part of the trust estate for the purpose of making any monthly payments under this agreement, or for the purpose of investing the proceeds of any such sale, or for any other purpose

in connection with this trust, and the purchaser of any property so sold shall not be required to see to the application of the proceeds of sale for the uses or purposes of this trust; (ii) to convey, lease, partition, divide and exchange any property at any time forming a part of the trust estate; (iii) to borrow money at any time and to secure the same by mortgage, deed of trust or pledge of the trust property or any part thereof; (iv) to lend money to the trust and on account of the trust estate, at current rates of interest and on terms at which similar loans are made, and to take as security for any such loan a mortgage, deed of trust or pledge of the trust property or any part thereof; (v) to deposit at any time trust funds in any savings bank or in the savings department of any bank, including the savings department of said The San Francisco Bank, and, in the event of any such deposit in the savings department of said The San Francisco Bank, such deposit shall receive the interest customarily paid on such deposits and no more, and the deposit of trust funds in a savings bank, or in the savings department of any bank, including said The San Francisco Bank, shall be a sufficient investment thereof, and any such deposit may be maintained by the Trustees as long as they may deem advisable; (vi) to pay and discharge all deeds of trust, mortgages, liens or other charges against the trust estate; (vii) to invest and reinvest any moneys at any time forming a part of the principal of the trust estate in any property, whether or not permissible by law as investments for trust funds; (viii) to have, respecting bonds,

shares of stock and other securities, all the rights, powers and privileges of an owner, including, though without limiting the foregoing, voting, giving proxies, making payments of calls, assessments and other sums deemed by the Trustees expedient for the protection of the interests of the trust estate, exchanging securities, selling or exercising stock subscription or conversion rights, participating in foreclosures, reorganizations, consolidations, mergers, liquidations, pooling agreements, voting trusts, assenting to corporate sales, leases and encumbrances; the Trustees, however, shall be under no personal liability in respect to any security at any time held hereunder; (ix) to reimburse themselves from the income and/or principal of the trust estate for any loss in liability or expense incurred by reason of their ownership or holding of any property received by them under this trust. The powers and discretions of the Trustees herein enumerated are not to be construed as a limitation upon their general powers and discretions, but the Trustees shall have the power and authority to do any and all other things which may be necessary or proper for the care, preservation and management of the trust estate.

(e) The Trustees shall not be liable for any errors of judgment made in good faith in the administration of this trust, nor for any loss or damage in connection therewith not occasioned by their wilful or wanton misconduct.

(f) Each and every beneficiary under this trust is hereby restrained from and shall be without right, power or authority to sell, transfer, pledge, mort-

gage, hypothecate, alienate, anticipate or in any other manner affect or impair his, her or their beneficial and legal rights, titles, interests, and estates in and to the income and/or principal of this trust during the entire term hereof; nor shall the rights, titles, interests and estates of any beneficiary hereunder be subject to the rights or claims of creditors of any beneficiary, and all the income and/or principal of this trust shall be transferable, payable and deliverable solely to the beneficiaries as herein provided, and the Trustees may require the personal receipt of any beneficiary as a condition precedent to the payment of any money or other property to such beneficiary.

(g) In any case in which the Trustees are required, pursuant to the provisions of this trust, to divide any trust property into parts or shares for the purpose of distribution, the Trustees are authorized and empowered, in their sole discretion, to make such distribution in kind or partly in kind and partly in money, and for the accomplishment thereof to make such sales of the trust property as the Trustees may deem necessary, upon such terms and conditions as the Trustees shall see fit, and also to determine the relative values of any parts of the trust property. The decision of the Trustees making such division as to any matter concerning the same shall be binding and conclusive upon all persons interested in the trust.

(h) In the event that any controversy arises between the beneficiaries of this trust or between any other persons respecting this trust or this agree-



ment or any part hereof, including, though without limiting the foregoing, any controversy as to the proper person or persons to whom the trust property, or any part or share thereof, shall be paid or distributed, the Trustees shall not be required to determine such controversy but may require that the same shall be determined by appropriate legal proceedings and shall not be required to act with respect to any property which is the subject of such controversy until such determination has been made, and in the event of any such legal proceedings the Trustees shall be entitled to reimbursement for any expenses incurred by them in connection therewith, including reasonable attorney's fees.

(i) It shall be the duty of the several persons, to whom the Trustees are directed to make payments hereunder, to notify the Trustees in writing of the happening of the event or events by reason of which such persons, or any of them, may become entitled to receive any such payment, and to furnish proof to the reasonable satisfaction of the Trustees of the happening of such event or events. Any payment pursuant to the terms hereof made in good faith by the Trustees before receiving such notice and such satisfactory proof, or in reliance upon such notice and such satisfactory proof when received, shall be deemed to have been made in the lawful execution of the trust hereby created. The Trustees shall be entitled to rely upon every signature, certificate, letter, bill and document believed by them to be genuine.

(j) For their services as Trustees hereunder, The San Francisco Bank and any bank or trust company which may be successor to it as Trustee shall receive reasonable compensation, but no other Trustees shall receive any compensation for his or her services as Trustee hereunder.

## V.

Any of the Trustees, other than The San Francisco Bank, may resign as Trustee at any time by delivering written notice of such resignation to The San Francisco Bank, and such resignation shall be effective upon receipt of said notice by The San Francisco Bank. The San Francisco Bank may at any time resign as Trustee by mailing written notice of such resignation to the other Trustees and to the Trustor, if she be then living, at the addresses of said Trustees and said Trustor last known to The San Francisco Bank, or, if the Trustor be then deceased, such notice shall be mailed to the other Trustees and to the then beneficiaries of this trust at their addresses last known to The San Francisco Bank. Any such resignation of The San Francisco Bank shall take effect at the expiration of 30 days from the date of mailing said notice at the United States Post Office in San Francisco, California, or any post box thereof; provided, however, that, with the written consent of the persons entitled to notice thereof, such resignation shall take effect at such earlier date acceptable to The San Francisco Bank as may be set forth in such written consent. The affidavit of any officer of The San Francisco Bank

as to the date of mailing any such notice shall be conclusive evidence thereof.

In the event that during the term of this trust Erida Leuschner Reichert shall die, become legally incompetent, or resign as Trustee hereunder, then Frederick Leet Reichert shall become Trustee hereunder in the place and stead of Erida Leuschner Reichert; or, if at such time said Frederick Leet Reichert shall be deceased or legally incompetent or not married to Erida Leuschner Reichert, or, if after becoming such Trustee, said Frederick Leet Reichert shall die, become legally incompetent, or resign as such Trustee, then and in any of such events Erida Leuschner Reichert, Jr., shall, if over the age of 21 years or upon attaining such age, become Trustee hereunder, and, if Erida Leuschner Reichert, Jr., shall be then deceased or legally incompetent, or if after becoming Trustee hereunder she shall die, become legally incompetent, or resign as such Trustee, then and in any of such events Susan Leet Reichert, if over the age of 21 years or upon attaining such age, shall become Trustee hereunder.

In the event that during the term of this trust Richard D. Leuschner shall die, become legally incompetent or resign as Trustee hereunder, then Richard D. Leuschner, Jr., shall, if over the age of 21 years or upon attaining such age, become Trustee hereunder in the place and stead of Richard D. Leuschner; or, if at such time Richard D. Leusch-

ner, Jr., shall be deceased or legally incompetent, or if after becoming Trustee hereunder he shall die, become legally incompetent or resign as such Trustee, then and in any of such events Elizabeth E. Leuschner, if over the age of 21 years or upon attaining such age, shall become Trustee hereunder.

In the event that all Trustees hereunder, other than The San Francisco Bank, and all persons named above to be Trustees hereunder shall have died, resigned or be legally incompetent to act as Trustees hereunder, The San Francisco Bank shall appoint as Trustees hereunder the two beneficiaries of this trust who are, in the sole discretion of The San Francisco Bank, best qualified to act as Trustees under this agreement.

The term "legally incompetent," as used above, shall mean finally adjudged by a court of competent jurisdiction to be an incompetent person.

## VI.

The trust created by this agreement shall be irrevocable and this agreement shall not be changed or modified in any manner by the Trustor or by any other person or persons.

## VII.

This agreement shall be simultaneously executed in four counterparts, each of which shall be deemed to be an original, and such counterparts together shall constitute but one and the same instrument.

In Witness Whereof, the parties hereto have executed this agreement the day and year first above written.

/s/ IDA DENICKE LEUSCHNER,  
Trustor.

THE SAN FRANCISCO BANK,

By /s/ J. D. BAKER,  
Its Vice President & Trust  
Officer.

/s/ ARMIN O. LEUSCHNER,

/s/ ERIDA LEUSCHNER REICH-  
ERT,

/s/ RICHARD D. LEUSCHNER,  
Trustees.

[Certified Copy.]

EXHIBIT "A"—BONDS

- \$1000 Amador Valley Joint Union High School—  
District of Alameda County and Contra  
Costa County—5%—due May 1, 1952—Bond  
No. 72 with May 1, 1941 and SCA
- \$1000 Berkeley School District of Alameda County  
—State of California—5%—due May 1, 1959  
—Bond No. 1419 with May 1, 1941 and SCA



- \$5000 State of California—State Highway Act—4%—due July 3, 1949—Bond Nos. 12878/81 incl., 12900 with July 3, 1941 and SCA
- \$1000 East Bay Municipal Utility District—1925 Water Bond—5% Serial Gold Bond—5%—due January 1, 1955—Bond No. 20351 with July 1, 1941 and SCA
- \$1000 East Bay Municipal Utility District—1925 Water Bond—5% Serial Gold Bond—due January 1, 1974—Bond No. 38730 with July 1, 1941 and SCA
- \$1000 Los Angeles City High School District—County of Los Angeles—4 $\frac{3}{4}$ %—due September 1, 1958—Bond No. 6600 with September 1, 1941 and SCA
- \$3000 Marin Municipal Water District—Water Bonds—5%—due October 1, 1946—Bonds Nos. 1337/1339 incl. with October 1, 1941 and SCA
- \$1000 Marin Municipal Water District—Water Bonds—5%—due October 1, 1949—Bond No. 1818 with October 1, 1941 and SCA
- \$1000 City and County of San Francisco—Water Bonds—4 $\frac{1}{2}$ %—due July 1, 1962—Bond No. 42495 with July 1, 1941 and SCA
- \$1000 San Jose Municipal Improvement—1924 City of San Jose—5%—due January 1, 1948—Bond No. 528 with July 1, 1941 and SCA

- \$1000 Stockton, City of—Harbor Bonds—4½%—due July 2, 1964—Bond No. 2720 with July 2, 1941 and SCA
- \$9500 The United States of America—Treasury Bonds—4¼%—due October 15, 1952/47—Bonds Nos. H00020938 for (5000.00 P/V), G00248027, D00321044 for (1000.00 P/V), each, K00065180, B00065182, A00065181, D00065184, C00065183 for (500.00 P/V), each—with October 15, 1941 and SCA
- \$7000 Southern Pacific Golden Gate Ferries Sinking Fund, First Mortgage, 5½%—due April 1, 1949, Nos. M2997/M3003 incl.
- \$1000 Union Rock Company, First Mortgage Serial Sinking Fund, 6% due September 1, 1941
- \$6000 Union Rock Company, First Mortgage Serial Sinking Fund, 6% due September 1, 1947

I. D. L. (Initialed)

### EXHIBIT "A"—STOCKS

- 90 shares American Can Company.
- 50 shares cap. American Telephone and Telegraph Company.
- 100 shares com. American Tobacco "B."
- 462 shares com. California Packing Corporation.

- 31 shares pfd. California Packing Corporation.
- 57 shares com. Chase National Bank.
- 42 shares cap. Chemical Bank and Trust Company.
- 55 shares cap. Continental Insurance Company.
- 10 shares com. Crown-Zellerbach Corporation.
- 60 shares \$5 cum. Crown-Zellerbach Corporation.
- 18 shares E. I. DuPont de Nemours Company.
- 61 shares cap. Franklin Fire Insurance Company.
- 50 shares com. General Motors Corporation.
- 110 shares cap. Great American Insurance Company.
- 38 shares cap. Hartford Insurance Company.
- 107 shares cap. Home Insurance Company.
- 55 shares cap. National Fire Insurance Company.
- 15 shares New York Trust Company.
- 108 shares cap. North River Insurance Company.
- 45 shares 1st pfd. 7% Northwestern Electric Company.
- 100 shares com. Pacific Telephone and Telegraph Company.
- 5 shares San Francisco Bank.
- 100 shares com. Southern California Edison Company.
- 12 shares cap. Springfield Fire and Marine Insurance Company.
- 65 shares Spring Valley Water Company.
- 229 shares cap. Standard Oil Company of California.



- 100 shares cap. Texas Gulf Company.
- 290 shares com. Tide Water Associate Oil Company.
- 385 shares com. Union Oil Company.
- 2296 shares com. Anglo-California Bank.
- 835 shares Honolulu Plantation Company.
- 50 shares Urban Realty Company.

I. D. L. (Initialed)

## EXHIBIT "A"—REAL PROPERTY

Clear title to 40 acres of Kadota fig orchard land in Merced County, California, known as Lots 39, 40, 41, and 42 of Ivott Subdivision, together with all appurtenances, accruals, lease rights, and growing crops.

I. D. L. (Initialed)

[Endorsed]: Filed March 8, 1956.

In the Superior Court of the State of California in  
and for the City and County of San Francisco

No. 456519

RICHARD D. LEUSCHNER,

Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COM-  
PANY, a California Banking Corporation, and  
ERIDA LEUSCHNER REICHERT,

Defendants.

### ANSWER

First Western Bank and Trust Company, one of  
the defendants herein, in answer to the complaint  
and each cause of action therein, admits, denies and  
alleges, as follows:

#### I.

Admits the allegations set forth in Paragraphs I,  
II, III, IV and V of the first cause of action inso-  
far as they relate to this defendant.

#### II.

Denies generally and specifically each of the alle-  
gations set forth in Paragraph VI of the first cause  
of action insofar as they relate to this defendant,  
and in this connection alleges that as of the date of  
the complaint this defendant as one of the trustees  
of said trust had on hand a fund in the amount of  
\$6,991.65 payable to plaintiff under and by virtue  
of the terms of said trust and that said fund would

have been paid to plaintiff as accumulated except for the fact that on the 22nd day of July, 1955, funds then payable to plaintiff and all funds thereafter to be payable to plaintiff were claimed by the United States of America under and pursuant to a notice of levy in the total amount of \$207,665.42 served on this defendant by the United States of America, and denies that there is now any fund or sum due or payable to plaintiff by said defendant.

### III.

Admits that plaintiff is one of the persons for whom said trust was created but alleges that this defendant has no information or belief sufficient for it to answer the remaining portions of Paragraph VII of said complaint and basing its denial on that ground denies each of said remaining portions generally and specifically.

In Answer to the Second Cause of Action of Said Complaint, This Defendant Admits, Denies and Alleges as Follows:

#### I.

Denies that within two years last past or at any time this defendant became or is now indebted to plaintiff in the sum of \$6,994 or in any sum for money had or received by this defendant for the use or benefit of plaintiff.

#### II.

Denies that this defendant has failed to pay to plaintiff any sums due to plaintiff from this de-

fendant, and in this connection alleges that all sums due or which became due to plaintiff since the 22nd day of July, 1955, are claimed by the United States of America under and pursuant to a notice of levy in the total amount of \$207,665.42 served on this defendant on said day by the United States of America.

Wherefore, this defendant prays that plaintiff take nothing by reason of the complaint or any cause of action set forth therein, and that this defendant have judgment for its costs of suit, reasonable attorneys' fee, and such further relief as may be proper therein.

Dated: April 6, 1956.

ORRICK, DAHLQUIST, HARRINGTON &  
SUTCLIFFE,  
Attorneys for Defendant, First Western Bank and  
Trust Company.

Duly verified.

[Endorsed]: Filed April 9, 1956.

In the Superior Court of the State of California, in  
and for the City and County of San Francisco

No. 456519

RICHARD D. LEUSCHNER,

Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COM-  
PANY, a California Banking Corporation, and  
ERIDA LEUSCHNER REICHERT,

Defendants.

FIRST WESTERN BANK AND TRUST COM-  
PANY, a California Banking Corporation,

Cross-Complainant,

vs.

RICHARD D. LEUSCHNER, ERIDA LEUSCH-  
NER REICHERT, and UNITED STATES  
OF AMERICA,

Cross-Defendants.

### ANSWER TO COMPLAINT

Comes now Erida Leuschner Reichert, one of the  
defendants and cross-defendants, in the above-en-  
titled action, and, answering the complaint on file  
herein, admits, denies and alleges as follows:

#### I.

Admits the allegations of Paragraphs I, III, IV

and V of the first cause of action insofar as they relate to this defendant.

## II.

Admits all of the allegations of Paragraph II of the said first cause of action insofar as they relate to this defendant, except the allegation therein contained as to the date of death of the said Armin O. Leuschner, and in that connection denies that the said Armin O. Leuschner died on April 15, 1943, and alleges that instead he died on April 22, 1953.

## III.

Denies each and every all and singular the allegations set forth in Paragraph VI of the said first cause of action insofar as they relate to this defendant, and in this connection alleges that as of the date of the complaint this defendant, as one of the trustees of the said trust and with the other two trustees thereof, had on hand a fund in the amount of \$6,991.65 payable to plaintiff under and by virtue of the terms of the said trust and that fund would have been paid to plaintiff as accumulated except for the fact that this defendant was informed and believes and therefore alleges that on July 22, 1955, the funds then payable to plaintiff and all funds thereafter to be payable to plaintiff were claimed by the United States of America under and pursuant to a notice of levy in the total amount of \$207,665.42 served on defendant First Western Bank and Trust Company by the United States of America, and denies that there is now any fund or



sum due or payable to plaintiff by this defendant as such trustee.

#### IV.

Admits that plaintiff is one of the persons for whom the said trust was created but alleges that this defendant has no information or belief sufficient for her to answer the remaining portions of Paragraph VII of the first cause of action, and basing her denial on that ground denies each of the said remaining portions generally and specifically.

Answering the Second Cause of Action in the Said Complaint Contained. This Defendant Admits, Denies and Alleges as Follows:

#### I.

Denies that within two years last past, or at any time, this defendant became, or is now, indebted to plaintiff in the sum of \$6,994, or in any sum whatever, for money had or received by this defendant for the use or benefit of plaintiff.

#### II.

Denies each and every, all and singular, the allegations of Paragraph II of the said second cause of action.

Wherefore, this defendant prays that plaintiff take nothing by reason of his complaint, or by any cause of action set forth therein, and that this defendant have judgment for her costs of suit, rea-

sonable attorneys' fees, and such further relief as may be proper in the premises.

SLACK AND ZOOK,  
JOHN E. TROXEL,

By /s/ JOHN E. TROXEL,  
Attorneys for Defendant  
Erida Leuschner Reichert.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 20, 1956.

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In the United States District Court for the Northern  
District of California, Southern Division  
No. 35398

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

FIRST WESTERN BANK AND TRUST COM-  
PANY, a California Banking Corporation,  
Defendant.

FIRST WESTERN BANK AND TRUST COM-  
PANY, a California Banking Corporation,  
Defendant and Third-Party Plaintiff,

vs.

RICHARD D. LEUSCHNER and ERIDA  
LEUSCHNER REICHERT,  
Third-Party Defendants.



RICHARD D. LEUSCHNER,

Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COMPANY, a California Banking Corporation, and  
ERIDA LEUSCHNER, REICHERT,

Defendant.

No. 35416

FIRST WESTERN BANK AND TRUST COMPANY, a California Banking Corporation,

Cross-Complainant,

vs.

RICHARD D. LEUSCHNER, ERIDA LEUSCHNER REICHERT and UNITED STATES OF AMERICA,

Cross-Defendants.

### STATEMENT OF POINTS ON APPEAL

Pursuant to Rule 75, Federal Rules of Civil Procedure, appellant Richard D. Leuschner (third-party defendant in action No. 35398, and plaintiff and cross-defendant in action No. 35416) files herewith his statement of points on appeal:

1. The Court erred in its judgment that Richard D. Leuschner, plaintiff in civil action No. 35416, take nothing in said action, and that the same should be dismissed on the merits.

2. The right of Richard D. Leuschner as a beneficiary of the spendthrift trust involved in this case is not subject to levy by the United States of America to enforce a tax lien against said beneficiary for unpaid balance of United States income taxes.

3. The claim of the United States of America is barred by *res adjudicata* in that said claim was previously raised in bankruptcy proceedings of Richard D. Leuschner, and the final order therein resulted in a rejection of the claim of creditors, including the claim of the United States of America against the interest of said Richard D. Leuschner as beneficiary of said spendthrift trust.

Dated: May 27, 1957.

A. B. CANELO,  
C. RAY ROBINSON,  
M. S. HUBERMAN,  
LEWIS, FIELD, DeGOFF  
AND STEIN,

By /s/ SIDNEY DeGOFF,  
Attorneys for Appellant.

[Endorsed]: Filed May 28, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO  
SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the supplemental record on appeal herein as designated by counsel for the appellant:

Stipulation and Order Dismissing Appeal of United States of America.

Designation of Additional Matters for Inclusion in Record on Appeal.

Supplemental Transcript of Record on Removal from the Superior Court With Complaint; Answer of First Western Bank and Trust Company; Cross-Complaint of First Western Bank and Trust Company; Answer of Erida Leuschner Reichert to Cross-Complaint and Answer and Erida Leuschner Reichert to Complaint.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 30th day of October, 1957.

[Seal]                      C. W. CALBREATH,  
Clerk;

By /s/ MARGARET P. BLAIR,  
Deputy Clerk.

[Endorsed]: No. 15618. United States Court of Appeals for the Ninth Circuit. Richard D. Leuschner, Appellant, vs. First Western Bank and Trust Co., a Corporation, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 30, 1957.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.